UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Ralphs Grocery Company

and

United Food and Commercial Workers Union, Local No. 135,

United Food and Commercial Workers Union, Local No. 324,

United Food and Commercial Workers Union, Local No. 770,

United Food and Commercial Workers Union, Local No. 1036,

United Food and Commercial Workers Union, Local No. 1167,

United Food and Commercial Workers Union, Local No. 1428, and

United Food and Commercial Workers Union, Local No. 1442

Case Nos. 31-CA-27160
31-CA-27475
31-CA-27685

CHARGING PARTIES' REPLY TO RESPONDENTS' ANSWERING BRIEF

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I.
INTRODUCTION

On August 17, 2012, the Honorable William G. Kocol held a hearing in the dispute between Ralphs Grocery Company and Charging Parties United Food and Commercial Workers Union Locals over Ralphs' refusal to disclose documents related to its internal investigation of its unlawful hiring of locked-out employees under false names, false Social Security numbers, false I-9 forms and false W-4s. During that hearing, Charging Parties offered, and Judge Kocol admitted, pleadings and other documents related to *U.S. v. McGowan, et al*, a criminal case against Ralphs Senior Executives culpable in the unlawful hiring scheme (hereinafter *"McGowan"* documents).

The *McGowan* documents established that, despite Ralphs' insistence upon its claimed attorney-client privilege over the documents related to its internal investigation, Ralphs had disclosed the documents to the U.S. Attorney's Office during the prior criminal case against Ralphs for the same unlawful hiring scheme – *U.S. v. Ralphs Grocery Company*. Judge Kocol admitted the *McGowan* documents as evidence that not only had Ralphs disclosed such documents to the USAO, effectively waiving any protection or privilege over such documents; but the USAO disclosed those same documents to the *McGowan* defendants, further waiving any claimed privilege.

The *McGowan* documents consist of the following:

Document No. 1	Indictment in the *McGowan* case.
Document No. 2	Declaration of Michael M. Amir In Support of Defendant Scott Drew's Notice of Motion and Motion for an Extension of Time to File Discovery Motions.
Document No. 3	Defendant Scott Drew's Notice of Motion and Motion for an Extension of Time to File Discovery Motions.
Document No. 4	Government's Consolidated Response to the Motions of Defendants McGowan and Drew for Pretrial Discovery.

Document No. 5 Government's Trial Memorandum.

Document No. 6 Defendant Scott Drew's Response to Evidentiary Arguments Raised in the Government's Trial Brief.

Judge Kocol admitted the documents under his broad discretion, but concluded that they were inadmissible under the residual exception of Federal Rules of Evidence Rule 807 and that they did not constitute public records exempt from the hearsay prohibition pursuant to FRE Rule 803(8). Charging Parties took exception to Judge Kocol's inadmissibility conclusions and Ralphs replied through an answering brief that grossly distorted these proceedings and included misstatements of law. The *McGowan* documents *are admissible* under the residual exception and the public records hearsay exception, and the Board should so find.

II.
ARGUMENT

A. The *McGowan* Documents Were The Best Available Evidence Of Ralphs' Double Waiver Of Privilege And Were Therefore Admissible Under FRE Rule 807, the Residual Exception

The Residual Exception at FRE Rule 807 permits the admission of evidence that is "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." FRE Rule 807(a)(3). The *McGowan* documents are *the most probative* evidence to establish that not only did Ralphs produce documents related to its internal investigation to the USAO, but also that *the USAO turned around and disclosed such documents to third-party McGowan defendants*. The documents are therefore admissible under the residual exception.

In its answering brief to Charging Parties' cross-exceptions, Ralphs once again claims that Charging Parties could have called a witness from the USAO to testify to the disclosure of the documents related to Ralphs' internal investigation. This argument is disingenuous and flawed. As Charging Parties explained in its cross-exceptions and

incorporate through reference herein, the Jencks Act prevented any representative of the USAO from appearing before any Administrative Law Judge in this proceeding. (Cross Exceptions at 8) Charging Parties could not have known at the time of the hearing before Administrative Law Judge Lana Parke, that the USAO would commence criminal charges against the *McGowan* defendants a year from then. But the *McGowan* proceedings precluded any government official from testifying about the documents related to Ralphs' internal investigation. Charging Parties did not attempt to subpoena the USAO at that time since such efforts would have been futile. For those same reasons, Charging Parties did not subpoena testimony from the USAO before Judge Kocol.

Given the circumstances, the *McGowan* documents that contained statements of the USAO, signed by an Assistant U.S. Attorney and in some cases declared under penalty of perjury, are more probative than any other statements of the USAO. They are certainly more probative than statements made by government representatives who may not have even been involved in the criminal case against Ralphs or the *McGowan* prosecution. The *McGowan* documents are more probative than any other evidence available at the time.

Ralphs has the audacity to further contend that Charging Parties "could have – at any point in time, including at the original hearing in this matter – called a witness from Respondent and asked what documents had been disclosed to the USAO." This is specious and absurd.

Ralphs makes this argument in bad faith as it has asserted throughout these proceedings that the documents it produced to the USAO are privileged under the Limited Waiver of Attorney-Client Privilege and Protections of Attorney Work Product Doctrine attached to Ralphs' Plea Agreement with the USAO. Ralphs had previously

refused to provide such information. Indeed, it had adamantly opposed admission of the Plea Agreement; a document that *clearly identified* the documents related to Ralphs' internal investigation as documents it must disclose to the USAO pursuant to the Agreement. Had Charging Parties asked Ralphs what documents it had disclosed to the USAO, Ralphs would certainly have refused to respond under its claimed privilege as it had done throughout these proceedings.[1]

Moreover, the *McGowan* documents not only established that Ralphs produced documents to the USAO, but also that the *USAO turned around and produced those same documents to third parties* – the *McGowan* defendants. This is a double waiver of any claimed privilege. As Ralphs was not a party to the *McGowan* case, it could not have provided direct testimony concerning such disclosures.

It is Ralphs who relies on flawed reasoning, and the Board should reject its arguments.

B. The *McGowan* Documents Are Admissible Under FRE Rule 803(8), the Public Records Exception

Charging Parties submit that *McGowan* Documents 1, 2, 4, and 5, are admissible under the public records hearsay exception. The statements for which Charging Parties request consideration are all statements of a public office setting out the office's activities, clearly covered under Rule 803(8).

Ralphs relies on *one case - Pendergest-Holt v. Certain Underwriters at Lloyd's of London*, 751 F.Supp.2d 876, 890 n. 52 (S.D. Tex. 2010) – for its contention that the statements in a plea agreement are not those of the U.S. Government. They further claim that *Pendergest-Holt* rejected "the use of Rule 803(8) to admit statements of

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[1] It should also be noted that contrary to its legal obligations, Ralphs Grocery Company never produced a privilege log. Had Ralphs acted properly before the Administrative Law Judge and this Board, a log would also be in evidence.

defendant in a plea agreement." *Id.* Ralphs is incorrect and relies on an erroneous analysis of the case. To the contrary, the court in *Pendergest-Holt admits* statements in the plea agreement "to the extent the factual information in Davis's plea agreement and the rearraignment transcript contain matters against Davis's penal and other interests." *Id.* The only statements the court excluded were those by the defendant concerning the conduct of others.

Ralphs' reliance on *Pendergest-Holt* is inapposite and irrelevant to the instant dispute as Charging Parties do not seek the admission or consideration of the *McGowan* defendants' statements; rather, it is statements *of government officials* that Charging Parties submit constitute public records exempt from the hearsay exclusion.

The documents and excerpts of which Charging Parties request consideration merely show that the USAO requested and received documents related to Ralphs' internal investigation and audit. Charging Parties do not attempt to make any assessment of Ralphs' culpability nor do they introduce the documents for that purpose.

Further, Ralphs erroneously contends that Charging Parties improperly rely on cases determining admissibility based on the "old version of FRE 803(8)" which it claims "was more expansive." (Ralphs Reply Brief at 5) This is incorrect. To the contrary, when the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States Courts decided to "restyle" the Federal Rules of Evidence along with other Federal Rules, it included this "Committee Note" at the end of Rule 803:

> The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be

stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

(emphasis added)

As stated by the Committee, the stylistic changes in the newer version of the rule have no impact on the admissibility of evidence. Ralphs once again attempts to make incorrect legal assertions. Documents 1, 2, 4 and 5 of the *McGowan* documents are all admissible as public records under FRE Rule 803(8).

III.
CONCLUSION

For all of the foregoing reasons, Charging Parties respectfully request that the Board grant its cross-exceptions.

Dated: January 4, 2012

Respectfully submitted,

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Ralphs Grocery Company -and-
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NLRB Case Nos. 31-CA-27160, 31, CA-27475 & 31-CA-27685

DIANE ROSS certifies as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 6300 Wilshire Boulevard, Suite 2000, Los Angeles, California 90048-5268.

On January 4, 2013, I served the foregoing document(s) described as

CHARGING PARTIES' REPLY TO RESPONDENTS' ANSWERING BRIEF

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Diane Ross
DIANE ROSS